

ISSUES

Claimant settled her workers compensation claims for injuries allegedly sustained in June, September, and December 1993. At the settlement hearing the respondent reserved its claims against the Workers Compensation Fund. When Judge Frobish decided the issue of Fund liability, he found the Fund was totally responsible for the compensation due claimant in her three claims.

Fund liability is the only issue on this appeal.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) In 1990 Cheryl A. Adair-Jensen began working for Klenda, Mitchell, Austerman & Zuercher as a legal secretary. While working for that law firm, Ms. Adair-Jensen allegedly sustained work-related injuries in June, September, and December of 1993. Claims for workers compensation benefits for those accidents were settled in December 1995. Klenda-Mitchell and its insurance carrier contend the Workers Compensation Fund should be responsible for the benefits associated with those claims.

(2) In September 1983, Ms. Adair-Jensen injured her neck in an automobile accident. After that accident, she periodically experienced painful episodes of neck and shoulder muscle spasm. Those periodic flare-ups continued after Ms. Adair-Jensen began working for Klenda-Mitchell in late 1990.

(3) Shortly after she began working for Klenda-Mitchell, the attorneys with whom she closely worked became acutely aware of her symptom flare-ups, which included headaches, muscle stiffness, and debilitating pain. As part of its efforts to accommodate her, the law firm allowed Ms. Adair-Jensen to leave work early, lie down during working hours, take days off, and change job duties. One attorney with whom Ms. Adair-Jensen closely worked, Christopher A. McElgunn, recalled several conversations and meetings he had with Ms. Adair-Jensen before June 1993 that concerned her neck problems. Additionally, Ms. Adair-Jensen would periodically wear a cervical collar to work.

(4) Based upon the testimony of Mr. McElgunn and two other Klenda-Mitchell attorneys, Alan D. Herman and Alexander Mitchell, the Appeals Board finds that the law firm had knowledge before Ms. Adair-Jensen's first alleged accident of June 1993 that her neck injury interfered with her ability to work. But despite that knowledge, the law firm retained Ms. Adair-Jensen in its employment.

(5) The accidents that Ms. Adair-Jensen sustained in June, September, and December 1993 were relatively minor and she would not have sustained injury as a result of those minor incidents but for the preexisting neck condition. That conclusion is supported by the testimony of Ernest R. Schlachter, M.D., the only physician who testified in this proceeding

and the only physician who provided an opinion regarding the relationship of Ms. Adair-Jensen's preexisting condition and her 1993 work-related injuries. Although Fund counsel made inroads on cross-examination to attack the foundation of Dr. Schlachter's opinions, overall the doctor's opinion remains credible that the relatively minor accidents that Ms. Adair-Jensen sustained in 1993 would not have caused her injury if she had not previously injured her neck.

CONCLUSIONS OF LAW

(1) Before liability can be assessed against the Workers Compensation Fund, an employer must prove that it either hired or retained a worker in its employment despite having knowledge that the worker had an impairment that constituted a handicap.¹

(2) A handicapped individual is defined as one who is afflicted with an impairment of such character that it constitutes a handicap in obtaining or retaining employment.²

(3) Before liability can be assessed against the Fund, the employer must also prove the resulting injury or disability either "would not have occurred but for the preexisting physical or mental impairment" or the resulting disability "was contributed to by the preexisting impairment."³

(4) The Appeals Board concludes that before her 1993 work-related accidents Ms. Adair-Jensen's neck injury constituted a handicap in her obtaining and retaining employment. As indicated in the findings above, the neck injury periodically interfered with her ability to work causing her to either leave work early, miss days from work, or lie down during the work day. And, Klenda-Mitchell had knowledge of that impairment and handicap.

(5) Also, as indicated in the findings above, the Appeals Board concludes that Ms. Adair-Jensen's 1993 work-related injuries "would not have occurred but for" the preexisting impairment.

(6) Based upon the above, the Award should be affirmed. The Appeals Board hereby adopts Judge Frobish's findings and conclusions to the extent they are not inconsistent with the above.

¹ K.S.A. 44-567(a).

² K.S.A. 44-566.

³ K.S.A. 44-567(a)(1), (2).

AWARD

WHEREFORE, the Appeals Board affirms the Award dated February 3, 1998, entered by Administrative Law Judge Jon L. Frobish.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard J. Liby, Wichita, KS
Steven L. Foulston, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director